

# United States Bankruptcy Court

For the NORTHERN District of IOWA

Chapter 11

IN RE:

Case No. X88-01395M

MCINTIRE FEED & GRAIN, INC.,  
Debtor.

FILED  
U.S. BANKRUPTCY COURT S.C.  
NORTHERN DISTRICT OF IOWA

AUG 08 1989

BARBARA A. EVERLY, CLERK

## JUDGMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable William L. Edmonds, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

[OR]

☐ The issues of this proceeding having been duly considered by the Honorable William L. Edmonds, United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED:

that David M. Nelsen, attorney for Unsecured Creditors Committee, is allowed as an administrative expense interim attorney fees and expenses in the amount of \$4,351.03. The debtor-in-possession shall pay these fees and expenses by paying \$851.03 to Nelsen within seven days of the entry of this order and by subsequent payments of \$700.00 per month for five months beginning on the first day of September, 1989.

copies mailed with order 8/8/89,



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BARBARA A. EVERLY  
Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]

8-8-89

*Laurie M. Johnson*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF IOWA

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BARBARA A. EVERLY, CLERK

IN RE:

McINTIRE FEED & GRAIN, INC., )  
Debtor. )

Chapter 11  
Bankruptcy No. X88-01395M

MEMORANDUM AND ORDER RE:  
ATTORNEY FOR UNSECURED CREDITORS COMMITTEE'S APPLICATION  
FOR INTERIM ALLOWANCE OF COMPENSATION AND EXPENSES

The matter before the court is an application for interim allowance of compensation and expenses filed by David M. Nelsen, attorney for unsecured creditors committee. Objections to the application were filed by debtor McIntire Feed & Grain, Inc. and St. Ansgar State Bank. The matter was submitted to the court on briefs filed by the applicant, objectors and by the U. S. Trustee. The court now issues its findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

BACKGROUND

The debtor, McIntire Feed & Grain, Inc., filed its chapter 11 petition on September 13, 1988. The U. S. Trustee appointed a committee of unsecured creditors. On October 31, 1988, an application was filed by the creditors committee requesting the appointment of David Nelsen as its attorney. An order appointing Nelsen as attorney was entered.

The debtor listed the following assets on its bankruptcy schedules:

<u>Property</u>	<u>Value</u>
Elevators in Stacyville and McIntire, Iowa	\$470,938.00
Semi-tractor and semi-trailer	25,000.00
Accounts receivable	10,488.65
Inventory	<u>871.50</u>
Total	\$507,298.15

On its schedules, the debtor listed total debts of \$665,670.09.

The secured debts include:

<u>Secured Creditor</u>	<u>Amount of Debt</u>
First National Bank of Leroy	\$ 10,000.00
St. Ansgar State Bank	342,600.00
Debt on semi-tractor and trailer	15,000.00
Debt on elevator and assets to two former shareholders	<u>111,800.00</u>
Total	\$479,400.00

According to debtor's brief, the debtor currently has \$12,800.00 cash on hand and was expected to receive a lease payment in the beginning of July in the amount of \$58,000.00. The main income of the debtor is the semi-annual payments on the facilities leased from debtor-in-possession to Peavey Company. St. Ansgar State Bank has a security interest in the semi-annual lease payments from Peavey Co. by virtue of an assignment of the lease payments.

Since the date of the filing of the bankruptcy, St. Ansgar State Bank has received a total of \$37,460.00 and First National Bank of Leroy has received \$6,540.00. The court has allowed as an administrative expense appraisal fees in the amount of \$1,194.00. The debtor's attorney has not applied for any interim fees. The

debtor's attorney stated that her accrued fees were currently in the approximate sum of \$4,500.00. The accountant for the debtor-in-possession is currently due \$1,770.00. The debtor claims that the administrative expenses incurred thus far total the sum of \$10,700.00. These expenses include the accountant fees, the attorney fees for the unsecured creditors committee and attorney fees for the debtor's attorney. Debtor argues also that the debtor-in-possession is operating a business and needs some cash to pay wages, payroll taxes, insurance and other regular monthly expenses.

#### DISCUSSION

David Nelsen, the attorney for the Unsecured Creditors Committee, has filed an application for interim attorney fees pursuant to 11 U.S.C. § 331. Nelsen requests the court to allow interim attorney fees in the sum of \$5,267.60 and expenses in the sum of \$128.43.

Objections to Nelsen's application have been filed by the debtor-in-possession and St. Ansgar State Bank. The objectors argue that the debtor-in-possession does not have sufficient assets to meet all of its current secured obligations and administrative expenses and, therefore, Nelsen's interim fee application should not be allowed.

Section 331 of the Bankruptcy Code provides:

A trustee, an examiner, a debtor's attorney, or any professional person employed under § 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case

under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under § 330 of this title. After notice and the hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

11 U.S.C. § 331.

The court must look at 11 U.S.C. § 330 to determine if the applicant is entitled to interim compensation. Section 330(a) provides:

After notice to any parties in interest and to the United States Trustee and a hearing, and subject to §§ 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under § 327 or 1103 of this title, or to the debtor's attorney--

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a).

This court recognizes that it should attempt to analyze an interim fee application as if the court were analyzing a final fee application. This requires the court to determine the reasonableness of the interim fees and make a determination at the time of the pending interim application. See In re Kaiser Steel Corp., 74 B.R. 885, 887-888 (Bankr. D. Colo. 1987). However, it is not always possible to determine whether the fees are compensable during the early stages of the bankruptcy proceeding. One of the

most important factors in the court's determination of attorney compensation is the results attained or the value of the attorney's services. See 11 U.S.C. § 330(a); In re Mansfield Tire & Rubber Co., 19 B.R. 125, 127 (Bankr. N.D. Ohio 1981).

The Unsecured Creditors Committee may select and authorize the employment of an attorney to represent or perform the services for such committee with the court's approval. 11 U.S.C. § 1103(a). An order approving the application for appointment of attorney for creditors committee was granted on November 9, 1988. In order to determine if the services performed by Nelsen were necessary, the court will consider the duties of the Unsecured Creditors Committee as set forth in 11 U.S.C. § 1103(c). Those duties include:

- (1) consult with the trustee or debtor-in-possession concerning the administration of the case;
- (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
- (4) request the appointment of a trustee or examiner under § 1104 of this title; and
- (5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c).

The court has reviewed the application of Nelsen and finds that the services for the Unsecured Creditors Committee were necessary and were in furtherance of the Unsecured Creditors

Committee's statutory functions. See In re Pettibone Corp., 74 B.R. 293, 309 (Bankr. N.D. Ill. 1987).

Nelsen requests an hourly rate of \$125.00. It is the obligation of the bankruptcy court to determine a reasonable hourly rate. In re S.T.N. Enterprises, Inc., 70 B.R. 823, 842 (Bankr. D. Vt. 1987). The court, having examined the case file and relying on its own experience with regard to attorneys' fees, finds and concludes that \$100.00 per hour is a fair and reasonable hourly rate.

The court finds that Nelsen should be allowed attorney fees for 41.8 hours at \$100.00 per hour for a total of \$4,180.00. The court also finds that Nelsen should be allowed reimbursement for expenses in the sum of \$171.03.

The court has concluded that Nelsen has rendered reasonable services and expenses totaling \$4,351.03. The court does not believe that at present there are sufficient assets to fully pay all administrative expenses. According to the monthly reports, debtor-in-possession rarely reaches the end of a month with cash in excess of \$2,000.00. The determination of when administrative expenses are to be paid is within the discretion of the court. Spartan Plastics v. Verco Ind. (In re Verco Ind.), 20 B.R. 664, 665 (Bankr. 9th Cir. 1982).

A number of courts have recognized that interim fees should only be paid when it is clear that the assets of the estate will be sufficient to pay all administrative expenses. In re Chips 'N Twigs, Inc., 58 B.R. 109, 111 (Bankr. E.D. Pa. 1986); In re First

Hartford Corp., 23 B.R. 729, 732 (Bankr. S.D. N.Y. 1982); In re American Intern. Airways, Inc., 47 B.R. 716, 722 (Bankr. E.D. Pa. 1985); In re Robin Industries, Inc., 16 B.R. 695, 697 (Bankr. N.D. Ga. 1982).

Although the court recognizes that administrative expenses are to be paid pro rata, the court also recognizes that the attorney for the Unsecured Creditors Committee should not be required to finance the administration of the case and should be paid some interim fees. See In re Mansfield Tire & Rubber Co., 19 B.R. 125, 127 (Bankr. N.D. Ohio 1981). Therefore, the court in allowing interim fees to Nelsen will order also that such fees be paid over a reasonable period of time.

The court must express its concern regarding the debtor's apparent inability to pay all administrative expenses. The court cannot confirm a chapter 11 plan unless all of the administrative expenses allowed under § 503(b) are paid in cash on the effective date of the plan. 11 U.S.C. § 1129(a)(9)(A).

#### ORDER

IT IS ORDERED that David M. Nelsen, attorney for Unsecured Creditors Committee, is allowed as an administrative expense interim attorney fees and expenses in the amount of \$4,351.03. The debtor-in-possession shall pay these fees and expenses by paying \$851.03 to Nelsen within seven days of the entry of this order and by subsequent payments of \$700.00 per month for five months beginning on the first day of September, 1989.



SO ORDERED THIS 7<sup>th</sup> DAY OF AUGUST, 1989.



William L. Edmonds, Bankruptcy Judge

cc: David M. Nelsen  
Judith O'Donohoe  
Patrick J. Rourke  
U. S. Trustee  
on 8/8/89, *LM*